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9   **UNITED STATES DISTRICT COURT**

10   **NORTHERN DISTRICT OF CALIFORNIA**

11   **OAKLAND DIVISION**

12 PHOENIX TECHNOLOGIES LTD., a   Case No. 4:09-cv-04697-CW (EDL)
    Delaware corporation,
13   **SECOND AMENDED COMPLAINT FOR**
                 Plaintiff,   **(1) PATENT INFRINGEMENT;**
14   **(2) BREACH OF CONTRACT;**
         vs.   **(3) INTERFERENCE WITH CONTRACT;**
15   **(4) TRADE SECRET**
    DEVICEVM, a Delaware corporation, and **MISAPPROPRIATION; (5) UNFAIR**
16 BENEDICT CHONG, an individual,   **BUSINESS PRACTICES; AND**
                                          (6) CONVERSION
17   Defendants.

18   **JURY TRIAL DEMAND**

19 _____

20 DEVICEVM, INC., a Delaware corporation, Judge: Honorable Claudia Wilken
                                            Room: Courtroom 2, 4th Floor
21   Counter-claimant,
                                            Complaint Filed: July 17, 2009
22   v.   Trial Date: TBD

23 PHOENIX TECHNOLOGIES LTD., a
    Delaware corporation,
24
                 Counterclaim-defendant.
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PLAINTIFF'S SECOND AMENDED COMPLAINT   Case No. 4:09-cv-04697-CW (EDL)

1   Plaintiff Phoenix Technologies Ltd. ("Phoenix"), for its Second Amended Complaint against

2   Defendants DeviceVM, Inc. ("DeviceVM") and Benedict Chong ("Chong") (collectively,

3   "Defendants"), alleges as follows:

THE PARTIES

5   1.   Phoenix Technologies Ltd. is a Delaware corporation with its principal place of

6   business in Milpitas, California.

7   2.   Founded in 1979, Phoenix designs, develops and supports system software and

8   related applications and services for personal computers ("PCs") and other computing devices.

9   Phoenix's products support and enable the compatibility, performance, connectivity, security and

10   management of the various components and technologies used in such devices. Phoenix established

11   industry leadership and effectively created the PC clone industry with its original BIOS product for

12   Compaq in 1983.

13   3.   Phoenix sells its products primarily to computer and component device

14   manufacturers. The company also provides training, consulting, maintenance and engineering

15   services to its customers.

16   4.   DeviceVM is a Delaware corporation with its principal place of business in San Jose,

17   California. On information and belief, DeviceVM is a privately held software company

18   headquartered in Silicon Valley with offices in Taiwan and China.   On information and belief,

19   DeviceVM was founded in 2006 and is funded by various venture capital firms and private

20   investors based in China and the United States.

21   5.   On information and belief, DeviceVM markets, sells, distributes and offers for sale a

22   product named Splashtop®, which it alleges is an instant-on pre-boot environment, developed by

23   DeviceVM, that allows a user to rapidly access the Web and key applications without the need to

24   boot the main operating system.

25   6.   Phoenix is informed and believes, and based thereon alleges that Chong, an

26   individual, works and resides in San Jose, California. Chong is a former Phoenix employee who,

27   Phoenix is informed and believes, and based thereon alleges, has worked for and is still employed

28   by DeviceVM.

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JURISDICTION AND VENUE

7.   This Court has subject matter jurisdiction over Phoenix's claims pursuant to 28 U.S.C. § 1331.

8.   Venue of this action is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b) and (c) and 28 U.S.C. § 1400(b).

BACKGROUND ALLEGATIONS

9.   Chong worked as an employee of Phoenix for eight years, from approximately November 1996 until November 2004. During his tenure at Phoenix, he worked as a "Principal Software Engineer" and/or "Team Lead." Generally speaking, these titles describe a senior level engineer who serves as the technical leader of a specific team, manages a group of engineers working on that team, and serves a role as an individual contributor in the development of a product line.

10.   In 1996, Phoenix hired Chong to play a significant role in Phoenix's engineering group responsible for Phoenix's development of core systems technology.

11.   Since Chong had access to Phoenix's most sensitive information, on or about November 1996, Phoenix presented and Chong signed an Employee Inventions and Proprietary Information Agreement (the "Agreement") as a condition of Chong's employment by Phoenix. A true and correct copy of the Agreement is attached hereto as Exhibit 1, and is incorporated herein by reference.

12.   The Agreement is valid and fully enforceable against Chong.

13.   Pursuant to Paragraph 3 of the Agreement, Chong agreed that all Innovations that: (a) are not developed entirely on Employee's own time; (b) are developed using equipment, supplies, facilities, confidential and proprietary information or trade secrets of Phoenix; (c) result from work performed by Employee for Phoenix; or (d) relate at the time of conception or reduction to practice to the business or the actual or demonstrably anticipated research or development of Phoenix, will be the sole and exclusive property of Phoenix. Chong also agreed to assign to Phoenix any rights that he may have in any such Innovations and in any associated patents, patent applications, copyrights, trade secret rights, mask work rights, rights of priority and other

- 2 -

1   intellectual property rights.

2   14.   Pursuant to Paragraph 4 of the Agreement, Chong agreed to assist Phoenix in every

3   proper way to obtain for Phoenix and enforce patents, copyrights, mask work rights and other legal

4   protections for Innovations belonging to Phoenix in any and all countries.

5   15.   Pursuant to Paragraph 5 of the Agreement, Chong agreed to irrevocably transfer and

6   assign to Phoenix, and forever waive and agree never to assert, any right to claim authorship or be

7   identified as the author of any Innovation, to object to any modification of, or other action in

8   relation to, any Innovation, or any similar right, existing under judicial or statutory law of any

9   country in the world, or under any treaty.

10   16.   Pursuant to Paragraph 6 of the Agreement, Chong acknowledged that his

11   employment with Phoenix created a relationship of confidence and trust with respect to any

12   information of a confidential and proprietary or secret nature that was disclosed to him by Phoenix,

13   or that he learned in the course of employment by Phoenix and that related to the business, products,

14   supplier, customers, research or development of Phoenix and its products. Such Proprietary

15   Information includes but is not limited to Innovations, marketing plans, product plans, business

16   strategies, financial information, forecasts, personnel information, customer lists and any other

17   nonpublic technical or business information that Employee knows or has reason to know Phoenix

18   would like to treat as confidential for any purpose, such as product development, maintaining a

19   competitive advantage, or avoiding undesirable publicity (hereinafter "Proprietary Information").

20   17.   Pursuant to Paragraph 7 of the Agreement, Chong agreed at all times, both during

21   and after his employment, to keep all such Proprietary Information in confidence and trust, and

22   agreed not to use or disclose any such Proprietary Information without the written consent of

23   Phoenix, except as may be necessary to perform his duties as an employee of Phoenix and for

24   Phoenix's benefit.

25   18.   In 2000, Phoenix began developing its FirstWare product line. Phoenix formed an

26   internal team that worked on the development of Phoenix's own Operating System for all related

27   products. The team was called the "Firmware OS Team" that was referred to internally as the "FOS

28   Team." The FOS Team worked on the FirstWare product line and Chong was a member of the FOS

- 3 -

1   Team. Chong was also a member of Phoenix's "Appliance Platform Engineering Group" between

2   approximately 2002 and the date of his departure from Phoenix.

3   19.   In 2001, Phoenix announced the availability of FirstView Connect product line. This

4   product contained, *inter alia*, technology that was an "instant on" web browser appliance that

5   provided instant-on Internet access and browsing capability for Internet TV, Internet Video Players,

6   interactive screen phones, game consoles, direct from memory set top boxes and handheld

7   appliances.

8   20.   Chong was involved in various aspects of the development of FirstView Connect and

9   served as Team Lead for the product development efforts.

10   21.   During 2002, while Chong was still a member of the FOS Team, Phoenix developed

11   another product called FirstSight which was a graphic user interface used to access applications

12   residing on the hard disk and could be incorporated into the BIOS.

13   22.   In addition, in the Fall of 2002, Phoenix's development team began working on the

14   Tripoli project which was focused on the development of a product called "cME Console." The

15   Tripoli project involved a Linux-based operating system environment upon which other applications

16   could run. The cME Console product could run applications or boot stand-alone Protected Service

17   Areas ("PSAs").

18   23.   In 2003, Chong, along with two other Phoenix engineers, conceived of a new boot

19   loader methodology which stored the bootloader in the BIOS and used the BIOS as the operating

20   system bootloader. The Phoenix project incorporating this methodology was called Raptor. The

21   invention was disclosed in United States Patent Application No. 10/842,780 entitled "Media Boot

22   Loader" (the "'780 Application"), filed on May 11, 2004, which names Chong as the first named

23   inventor.

24   24.   Likewise, during 2003, other members of the Phoenix FOS Team were continuing to

25   develop the technology to be utilized as the platform for the Console product referenced in

26   Paragraph 20. In connection with their development, on September 24, 2004 Phoenix prepared and

27   filed United States Patent Application No. 10/950,199 entitled "Operating System Transfer and

28   Launch Without Performing POST" (the "'199 Application"). The inventions in the '199

1 Application could be utilized to rapidly boot a second OS from a first OS without going through

2 Power on Self Text ("POST").

3   25.   In connection with its ongoing FirstWare product development, Phoenix publicly

4 introduced its FirstWare Assistant product in September of 2003. FirstWare Assistant provided

5 instant-on access to personal information management (PIM) data from Microsoft Outlook without

6 needing to first launch the Windows operating system. The product utilized a Phoenix customized

7 Windows NT bootloader that gave users a "hot key" option during boot to either load FirstWare

8 Assistant or the default operating system. Chong was the author for all revisions of the Product

9 Requirements Document ("PRD") for FirstWare Assistant 1.0.0.1.

10   26.   In addition to the PRD, Chong also authored at least the following documents: (a)

11 PRD for FirstWare Assistant 1.1; (b) PRD for FirstWare Assistant Challenger (i.e., FirstWare

12 Assistant 2.x); (c) Functional Specification for FirstWare Assistant Challenger Release 1B,

13 FirstWare Assistant Challenger Release 2 and FirstWare Assistant 2.0.1; (d) the Functional

14 Specification for FirstWare Assistant Challenger Release 2; (e) a detailed technical disclosure in a

15 FirstWare Assistant PowerPoint; and (f) other related technical documents.

16   27.   As Chong's involvement with the FirstWare Assistant was so substantial, he was

17 made Team Lead for the engineers working on the product line. In that capacity, he oversaw the

18 FirstWare Assistant product development efforts and worked closely with engineers working in

19 tandem on related Phoenix development projects directed at running various appliances in an

20 instant-on setting and Phoenix's "Always On" technology.

21   28.   In connection with his extensive involvement with the various Phoenix projects and

22 products identified above, Chong developed, had access to, and had substantial involvement with

23 Phoenix Proprietary Information during his eight years of employment by Phoenix. Chong's last

24 day as a Phoenix engineer was November 19, 2004.

25   29.   On information and belief, DeviceVM hired Chong as a Director, Program

26 Management, in January 2007.

27   30.   Not long after Chong joined DeviceVM, it filed United States Provisional Patent

28 Application No. 60/890,121 on February 15, 2007 entitled "Instant-On Appliances" (the "'121

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1 Provisional Application"). Chong is a named inventor on the '121 Provisional Application.

2   31.   On July 2, 2007, DeviceVM filed United States Patent Application No. 11/772,700

3 entitled "Method and Apparatus for Virtualization of Appliances" (the "'700 Application"). Chong

4 is a named inventor on the '700 Application. The '700 Application claimed priority to, *inter alia,*

5 the '121 Provisional Application and ultimately issued as U.S. Patent No. 7,441,113 (the "'113

6 Patent") on October 21, 2008.   Upon information and belief, Device VM's Spashtop® product

7 practices the inventions claimed in the '113 Patent.

8   32.   On July 3, 2007, DeviceVM filed international application No. PCT/US07/72778

9 entitled "Method and Apparatus for Virtualization of Appliances" (the "PCT Application"). The

10 PCT Application claims priority to, *inter alia,* the '121 Provisional Application and the '700

11 Application (which ultimately issued as the '113 Patent). Chong is a named inventor on the PCT

12 Application.

13   33.   On August 1, 2008, DeviceVM filed United States Application No. 12/184,374

14 entitled "Integration Model for Instant-On Environment" (the "'374 Application"). Chong is a

15 named inventor on the '374 Application.

16   34.   On August 28, 2008, DeviceVM filed United States Application No. 12/200,758

17 entitled "Method and Apparatus for Virtualization of Appliances" (the "'758 Application") as a

18 continuation of the '113 Patent. Chong is a named inventor on the '758 Application.

19   35.   Finally, on September 26, 2008, DeviceVM filed United States Application No.

20 12/239,701 entitled "Installation of a Virtualization Environment" (the '701 Application") as a

21 continuation-in-part of the '758 Application. Chong is a first named inventor on the '701

22 Application. The '121 Provisional Application, the '374 Application, the '700 Application, the

23 '758 Application, the '701 Application, and the PCT Application are collectively referred to as the

24 "DeviceVM Patent Applications."

25   36.   On information and belief, Chong has disclosed Phoenix Proprietary Information to

26 DeviceVM. DeviceVM has included Phoenix Proprietary Information in the DeviceVM Patent

27 Applications and such information is contained in the '113 Patent. Upon information and belief,

28 DeviceVM has incorporated Phoenix Proprietary Information in its Spashtop® product and this

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1 product contains inventions misappropriated from Phoenix through Chong.

2   37.   On information and belief, based in part on the misappropriated Phoenix Proprietary

3 Information, DeviceVM has misled Phoenix's potential customers and the public about the true

4 nature of its business and the purported independent development of its Splashtop® product.

5   38.   Phoenix only became aware of DeviceVM's and Chong's unlawful activities in June

6 2009. In addition, Phoenix recently discovered evidence of the use of an anti-forensic wiping tool

7 on the Phoenix computer that was assigned to Chong while employed at Phoenix. Upon

8 information and belief, Chong used such a tool to conceal information from Phoenix or destroy

9 evidence of misappropriation of Phoenix Proprietary Information.

10   39.   Phoenix is the assignee of United States Patent No.6,519,659 titled "Method and

11 System for Transferring An Application Program from System Firmware to A Storage Device" (the

12 "'659 Patent").

13   40.   The '659 Patent duly issued on February 11, 2003 and Phoenix owns all right, title

14 an interest in the '659 Patent. A true and correct copy of the '659 Patent is attached to the Second

15 Amended Complaint as Exhibit 2.

16   **FIRST CAUSE OF ACTION**

17   **INFRINGEMENT OF THE '659 PATENT AGAINST DEVICEVM**

18   41.   Phoenix incorporates by reference the above paragraphs as though set forth fully

19 herein.

20   42.   DeviceVM has and continues to directly infringe, contributorily infringe, and/or

21 induce the infringement of the '659 Patent by making, using, offering to sell, licensing, and/or

22 selling software and computer systems that are covered by the claims of the inventions contained in

23 the '659 Patent. Specifically, DeviceVM's SplashTop® product infringes one or more of the claims

24 of the '659 Patent.

25   43.   Phoenix has suffered damages as the result of DeviceVM's infringement of the '659

26 Patent.

27   44.   DeviceVM will continue to infringe, induce others to infringe, and/or engage in

28 contributory infringement of the '659 Patent unless enjoined by the Court.

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SECOND CAUSE OF ACTION

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BREACH OF CONTRACT AGAINST CHONG

3   45.   Phoenix incorporates by reference the above paragraphs as though set forth fully

4   herein.

5   46.   As a condition of his employment, Chong signed the Agreement with Phoenix,

6   Phoenix has performed every promise and condition required to be performed by it pursuant to the

7   Agreement except any which were or would be excused or prevented by the breaches of Chong as

8   set forth herein.

9   47.   On information and belief, Chong breached his obligations to Phoenix under the

10 Agreement by, among other things, engaging in the following activities: (a) misappropriating

11 Proprietary Information of Phoenix and using this information to develop products for DeviceVM

12 and submit in DeviceVM Patent Applications; (b) failing to keep Proprietary Information of

13 Phoenix in trust and confidence; (c) using and disclosing Phoenix's Proprietary Information on

14 behalf of DeviceVM without the written consent of Phoenix; (d) failing to return and deliver

15 Phoenix's Proprietary Information upon termination of employment with Phoenix; and (e) failing to

16 inform the PTO and other parties that the specific inventions that were conceived while Chong was

17 employed at Phoenix, and which are the subject of this Action, had already been assigned to

18 Phoenix or were otherwise owned by Phoenix.

19   48.   By reason of the foregoing, Phoenix has been damaged in an amount to be proven at

20 trial.

21

THIRD CAUSE OF ACTION

22

INTERFERENCE WITH CONTRACT AGAINST DEVICEVM

23   49.   Phoenix incorporates by reference the above paragraphs as though set forth fully

24 herein.

25   50.   At all times referenced herein the Agreement was and is a valid contract between

26 Phoenix and Chong.

27   51.   On information and belief, DeviceVM either knew or should have known of the

28 existence of the Agreement between Phoenix and Chong.

PLAINTIFF'S SECOND AMENDED COMPLAINT   Case No. 4:09-cv-04697-CW (EDL)

52.   On information and belief, DeviceVM induced Chong to breach the Agreement.

53.   By reason of DeviceVM's inducement, Phoenix has been damaged by the failure of Chong to perform and complete his obligations in accordance with the terms of the Agreement, in a sum to be proven at trial.

54.   DeviceVM's conduct has been willful, oppressive, and malicious, and done with the intent to injure Phoenix and deprive Phoenix of its property and legal rights. Phoenix is therefore entitled to exemplary and punitive damages in an amount sufficient to deter future wrongful conduct.

FOURTH CAUSE OF ACTION

TRADE SECRET MISAPPROPRIATION AGAINST ALL DEFENDANTS

55.   Phoenix incorporates by reference the above paragraphs as though set forth fully herein.

56.   Upon information and belief, Defendants have misappropriated, and are using Phoenix's trade secret information related to Phoenix's technology and business, without Phoenix's consent, and in order to compete directly with Phoenix.

57.   Defendants' conduct violates California's Uniform Trade Secrets Act.

58.   Phoenix has been irreparably harmed.

59.   Phoenix has suffered damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

UNFAIR BUSINESS PRACTICES AGAINST ALL DEFENDANTS

60.   Phoenix incorporates by reference the above paragraphs as though set forth fully herein.

61.   In the course of the wrongful conduct alleged herein, the Defendants, and each of them, engaged in unfair and unlawful business practices in violation of the common law and Sections 17200 et seq. of the California Business and Professions Code including, but not limited to, the misappropriation of confidential and Proprietary Information of Phoenix.

62.   The continuing activities of the Defendants in developing and exploiting the confidential and Proprietary Information stolen from Phoenix constitute an on-going pattern and

- 9 -

1 practice of unfair competition.

2   63.   The continuing activities of Defendants to mislead Phoenix's customers and the

3 public by representing that Splashtop® was independently developed through its own intellectual

4 property constitute an on-going pattern and practice of unfair competition.

5   64.   By reason of this activity, Phoenix has been harmed in an amount to be proven at

6 trial, and the public has been misled about the true nature of DeviceVM's business. Injunctive

7 relief is necessary to prevent further irreparable injury to Phoenix, and to put an immediate halt to

8 DeviceVM and Chong's on-going practice and pattern of wrongful conduct. DeviceVM has

9 obtained benefits from its unlawful activity, for which DeviceVM is required to disgorge or to make

10 restitution.

11 <div align="center">**SIXTH CAUSE OF ACTION**</div>

12 <div align="center">**CONVERSION**</div>

13   65.   Phoenix incorporates by reference the above paragraphs as though set forth fully

14 herein.

15   66.   Phoenix is the owner of the confidential and Proprietary Information

16 misappropriated by DeviceVM and Chong as found in certain DeviceVM Patent Applications

17 and/or the '113 Patent. Under the Agreement and Chong's legal obligations to Phoenix, this

18 information is exclusively owned by Phoenix. Phoenix is the owner of this information and has the

19 exclusive right to possession of it.

20   67.   DeviceVM and Chong converted Phoenix's property by a series of wrongful acts.

21 On information and belief, Phoenix's property was converted by: (a) misappropriating the

22 confidential and Proprietary Information containing Phoenix's inventions; (b) taking the

23 confidential and Proprietary Information and the inventions contained therein to DeviceVM; and (c)

24 utilizing the confidential and Proprietary Information and the inventions contained therein to

25 prosecute patent applications for DeviceVM and to develop technology based on the information

26 and inventions.

27   68.   By converting the confidential and Proprietary Information and inventions that are

28 exclusively owned by Phoenix, DeviceVM and Chong have caused great damage to Phoenix, in an

1 amount to be proven at trial.

2   69.   DeviceVM's conduct has been willful, oppressive, and malicious, and done with the

3 intent to injure Phoenix and deprive Phoenix of its property and legal rights. Phoenix is therefore

4 entitled to exemplary and punitive damages in an amount sufficient to deter future wrongful

5 conduct.

6   **PRAYER FOR RELIEF**

7   Wherefore, Phoenix prays judgment against Defendants as follows:

8   A.   For compensatory damages against Defendants to be proven at trial;

9   B.   For disgorgement and restitution from Defendants to be proven at trial;

10   C.   An award to Phoenix of punitive damages in a sum according to proof;

11   D.   An award to Phoenix of its costs, expenses and reasonable attorneys' fees incurred in

12 bringing and prosecuting this action, pursuant to the Agreement;

13   E.   An order directing the Defendants to correct the records of the PTO to reflect that all

14 intellectual property rights to the inventions conceived by Chong are owned by Phoenix, including

15 but not limited to all rights to all DeviceVM Patent Applications or issued patents arising from

16 Phoenix's confidential or Proprietary Information;

17   F.   A declaration that Phoenix was assigned all rights to the inventions conceived by

18 Chong while employed at Phoenix under the terms of the Agreement, and therefore that these

19 inventions are exclusively owned by Phoenix;

20   G.   Preliminarily and permanently enjoin the Defendants from:

21   (1)   disclosing, obtaining or using, or attempting to disclose, obtain or use any of

22 Phoenix's confidential or Proprietary Information misappropriated from Phoenix,

23   (2)   disseminating or destroying any documents, material or things now in their

24 possession that originated at Phoenix, that belong to Phoenix, or that embody or are derived from

25 Phoenix's confidential or Proprietary Information, or that are otherwise relevant to the subject

26 matter of this lawsuit,

27   (3)   manufacturing, selling, offering to sell, licensing, creating source code for,

28 marketing, or advertising, any product that incorporates or performs any of the inventions

1   misappropriated from Phoenix, or that is derived from any inventions or confidential or Proprietary

2   Information misappropriated by the Defendants.

3   H.   An order imposing a constructive trust for the benefit of Phoenix over:

4   (1)   the inventions claimed and/or disclosed in the Patents, and all DeviceVM

5   products based on and/or incorporating those inventions;

6   (2)   all profits, royalties, and other benefits resulting from the exploitation of the

7   inventions claimed and/or disclosed in the Patents, including all profits and royalties resulting from

8   the manufacture, sale, distribution, and marketing of each version of DeviceVM's products,

9   (3)   all software or other products that incorporate the inventions conceived by

10   Chong while employed at Phoenix, and any products derived from DeviceVM's illegal activities;

11   (4)   any United States or foreign patents or patent applications that claim priority

12   to the '113 Patent and/or that are supported by the disclosures in the DeviceVM Patent

13   Applications,

14   (5)   the confidential and/or Proprietary Information that was misappropriated

15   from Phoenix by DeviceVM and Chong,

16   (6)   any profits, revenues, or other benefits obtained by the Defendants as a result

17   of their utilization of the inventions contained in the '113 Patent or DeviceVM Patent Applications;

18   and

19   I.   That Phoenix be awarded compensatory and special damages for the infringement of

20   the '659 Patent in an amount to be determined at trial;

21   J.   That DeviceVM be preliminarily and permanently enjoined from infringing,

22   inducing others to infringe, and/or contributorily infringing the '659 Patent;

23   K.   That the Court declare this an exceptional case under 35 U.S.C. § 285 and award

24   Phoenix its attorneys' fees and costs incurred in connection with this action;

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1   L.   For such other and further relief as may be awarded at the trial of this matter

2   according to proof.

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                                       K&L GATES LLP

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7   Dated: March 24, 2010   By: /s/ Bryan J. Sinclair
                                                 BRYAN J. SINCLAIR

8   Attorneys for Plaintiff / Counter-defendant,

9   PHOENIX TECHNOLOGIES, LTD.

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PLAINTIFF'S SECOND AMENDED COMPLAINT   Case No. 4:09-cv-04697-CW (EDL)

1 **DEMAND FOR JURY TRIAL**

2 Phoenix demands a trial by jury of all issues so triable under the law.

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4 K&L GATES LLP

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6 Dated: March 24, 2010 By: /s/ Bryan J. Sinclair
        BRYAN J. SINCLAIR

7 Attorneys for Plaintiff / Counter-defendant,
8 PHOENIX TECHNOLOGIES, LTD.

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